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No. 96-157

In The

Supreme Court of the United States

October Term, 1995

In Re: USAir, Inc.

On Petition For Writ Of Prohibition
To The United States District Court
For The District Of South Carolina

BRIEF OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW*

1. Whether USAir has established, by clear and indisputable evidence, that the courts below, interpreting state privilege law, usurped judicial power by ruling that the documents USAir sought to protect were not privileged.

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* Pursuant to Rule 24(2) of the Rules of the Supreme Court of the United States, this section is included because Respondents are dissatisfied with its presentation by USAir.

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SUMMARY OF THE ARGUMENT

To be entitled to a writ of prohibition USAir must prove, by "clear and indisputable evidence," that: 1) the controlling state law, whether that of South Carolina or North Carolina, recognizes the self-critical evaluation privilege; 2) the documents at issue fall within the privilege; and 3) its "rights" will be irretrievably lost if it produces the documents or the wrong otherwise can never be effectively presented on appeal. USAir cannot meet this burden. Thus, its Petition for Writ of Prohibition should be denied.

ARGUMENT

A. TO PREVAIL USAIR MUST SHOW THAT ITS RIGHT TO ISSUANCE OF A WRIT OF PROHIBITION IS CLEAR AND INDISPUTABLE.

The issuance of a writ of mandamus or prohibition "is an extraordinary remedy, to be reserved for extraordinary situations." *Gulfstream Aerospace v. Mayacamas*, 485 U.S. 271 (1988). The power to issue such writs is discretionary and should be sparingly exercised. *Par v. United States*, 351 U.S. 513, *reh'g denied*, 352 U.S. 859 (1956). A writ may not be relied upon as a means for invoking review of non-appealable interlocutory orders, which do not impair the actual or potential jurisdiction of the court. *Carr v. Donohoe*, 201 F.2d 426 (8th Cir. 1953).

This Court recently reviewed the legal standards for obtaining a writ of mandamus in *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296 (1989):

> We have required that petitioners demonstrate a "clear abuse of discretion," or conduct amounting to "usurpation of [the judicial] power," to be entitled to issuance of the writ. To ensure that mandamus remains an extraordinary remedy, petitioners must show that they lack adequate alternative means to obtain the relief they seek, and carry "the burden of showing that [their] right to issuance of the writ is 'clear and indisputable.' "

Id. at 309 (*citations omitted*).

Generally, discovery orders are not reviewable by a writ of mandamus or prohibition. *Von Bulow v. Von Bulow*, 828 F.2d 94, 97 (2d Cir. 1987). This stringent legal standard is particularly appropriate where, as here, a party seeks to create a new testimonial privilege. "[T]his Court has well understood that the particular value the courts are distinctively charged with preserving – justice – is severely harmed by contravention of 'the fundamental principle that the public . . . has a right to every man's evidence.' " *Jaffee v. Redmond*, ___ U.S. ___, ___, 116 S.Ct. 1923, 1933 (1996) (Op. of Scalia, J. joined by Rehnquist, C.J., dissenting) (citing *Trammel v. United States*, 445 U.S. 40, 50 (1980)). Therefore, testimonial privileges "are not lightly created nor expansively construed, for they are in derogation of the search for the truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974).

Even if there has been a clear abuse of discretion relief does not automatically follow. Rather USAir must prove the "wrong . . . otherwise can never be effectively presented on appeal," or that its rights will be irretrievably lost if the petition is not granted. *Kerr v. United States*

District Court for the Northern District of California, 426 U.S. 394 (1976). Therefore, to prevail USAir must prove, by clear and indisputable evidence, that the courts below either abused their discretion or usurped authority and as a result USAir's rights will be irretrievably lost unless its petition is granted.

B. USAIR HAS FAILED TO SHOW THAT THE DOCUMENTS IN QUESTION ARE SUBJECT TO ANY PRIVILEGE.

1. THE COURTS BELOW FOUND THAT THE SELF-CRITICAL EVALUATION PRIVILEGE WAS NOT APPLICABLE.

In the trial court, USAir argued that South Carolina substantive privilege law applied[1] and that South Carolina recognized the self-critical evaluation privilege. USAir did not convince the trial court either that South Carolina law applied or that it would recognize the self-critical evaluation privilege if it did. On the contrary, Judge Anderson held:

> The court, however, finds it unnecessary to decide the troublesome issue of which state's

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[1] As District Court Judge Joseph F. Anderson, Jr. explained: "Federal Rule of Evidence 501 provides that where an action is governed by federal law, issues of privilege are determined in accordance with federal common law. Where, however, as here, the matter before the court is based upon diversity of citizenship, 'the privilege . . . shall be determined in accordance with state law.' Fed. R. Evid. 501." *In Re Air Crash at Charlotte, North Carolina on July 2, 1994, MDL 1014, Order of Judge Joseph F. Anderson, Jr., Dated October 2, 1995*, p. 2a (D.S.C. October 1995) (Appendix A to Petition for Writ of Prohibition).

> law should apply, or, alternatively, to what extent the law of either North Carolina or South Carolina would recognize the self-critical evaluation privilege. The court's review of the documents for which this privilege is asserted yields the conclusion that even if the relevant state recognized the self-critical evaluation privilege such a privilege would not apply under the circumstances presented here.

In Re Air Crash at Charlotte, North Carolina on July 2, 1994, MDL 1014, Order of Judge Joseph F. Anderson, Jr., Dated October 2, 1995, p. 4a (D.S.C. October 1995) (Appendix A to Petition for Writ of Prohibition). Furthermore, the district court stated, "[t]he Supreme Court and the circuit courts have neither definitely denied the existence of such a privilege, nor accepted it and defined its scope. Rather when confronted with a claim of the privilege, they refused on narrow grounds to apply it to the facts before them. . . . " *In Re Air Crash at Charlotte, North Carolina on July 2, 1994, MDL 1014, Order of Judge Joseph F. Anderson, Jr., Dated October 2, 1995*, p. 4a (D.S.C. October 1995) (quoting *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 427 fn1 (9th Cir. 1992)) (Appendix A to Petition for Writ of Prohibition).

In denying USAir's Writ of Prohibition, the Court of Appeals ruled in the following manner:

> [h]aving carefully reviewed the record and received the arguments of the parties and the *amicus curiae* we conclude that the district court did not clearly abuse its discretion or usurp judicial power in entering the challenged discovery order. *Cf. Mallard v. United States Dist.*

Court, 490 U.S. 296 309 (1989). Accordingly, USAir's petition is denied.

In Re: USAir, Inc., Order Dated May 2, 1996, p. 9a (4th Cir. 1996) (Appendix B to Petition for Writ of Prohibition).

2. THE COURTS BELOW DID NOT USURP THE FEDERAL AVIATION ADMINISTRATION'S AUTHORITY OR OTHERWISE ABUSE THEIR DISCRETION.

Apparently, USAir has now abandoned its claim that the trial judge abused his discretion and appears to rest solely on the contention, based on the Federal Aviation Administration's Advisory Circular 120-56 ("AC 120-56"), that the courts below usurped the Federal Aviation Administration's ("FAA") authority to make factual determinations.[2] *Petition for Writ of Prohibition*, pp. 4-9.

USAir's reliance on AC 120-56 is not only wrong, the argument is frivolous. The title of the Advisory Circular alone demonstrates the inapplicability of the document: *"Air Carrier **Voluntary Disclosure Reporting** Procedures."* (*emphasis added*). USAir's assertion that the FAA has endorsed the concept of a common law self-critical evaluation privilege for airline internal safety reviews that would bind state courts in tort cases finds no support in the language of the Advisory Circular. The plain language of AC 120-56 establishes that the FAA merely

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[2] While the Federal Aviation Administration's Advisory Circular 120-56 relied upon so heavily by USAir in this Court has been in effect since 1992, it was not even cited to the trial judge.

grants immunity from its civil penalties when an airline elects "to voluntarily disclose apparent violations to the Federal Aviation Administration." *Advisory Circular* 120-56, p. 12a (Appendix D to Petition for Writ of Prohibition). Under this program, an airline must upon detection of a violation *promptly disclose the violation to the FAA* and take timely corrective action to ensure that the same or similar violations do not recur. Before an airline obtains immunity from civil penalties under AC 120-56, the FAA must determine that the following five conditions are met:

(1) The certificate holder immediately notified the FAA of the apparent violation after detecting it and before the agency learned of it.

(2) The apparent violation must have been inadvertent.

(3) The apparent violation does not indicate a lack, or reasonable question, of basic qualification of the certificate holder.

(4) Immediate action must have been taken, or begun to have been taken, upon discovery to terminate the conduct that resulted in the apparent violation.

(5) The certificate holder must develop and implement a comprehensive fix satisfactory to the FAA.

Advisory Circular 120-56, pp. 14a-15a (Appendix D to Petition for Writ of Prohibition).

The documents USAir seeks to protect *were not disclosed* to the FAA. Any violations discovered *were not reported* to the FAA. That USAir may have learned of

dangerous practices or violations of the Federal Aviation Regulations in this audit and failed to report them to the FAA is the *exact opposite* type of conduct than AC 120-56 was intended to foster.

The voluntary disclosure policy states, "[t]he FAA believes that the **open sharing** of apparent violations and a cooperative as well as an advisory approach to solving problems will enhance and promote aviation safety." (*emphasis added*) Advisory Circular 120-56, p. 14a (Appendix D to Petition for Writ of Prohibition). The intent of AC 120-56 is clear. It is to promote open communications between the airlines and the FAA. Any attempt to read this advisory circular as promoting a general policy of nondisclosure is wrong.

USAir's reliance on *Jaffee v. Redmond*, ___ U.S. ___, 116 S.Ct. 1923, 1933 (1996) to support its argument for a self-critical evaluation privilege is misplaced. In *Jaffe*, after all fifty states recognized the psychotherapist privilege, this Court considered whether that privilege should be recognized under federal common law in a Section 1983[3] case. In concluding that the privilege should be recognized, this Court explained: "[e]ffective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories and fears. . . . [T]he mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Jaffee*, 116 S.Ct. at 1928. The Court also notes that the Judicial Conference Advisory Committee in

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[3] 42 U.S.C. § 1983.

1972 recommended that "Congress recognize a psychotherapist privilege. . . . " *Id.*

Jaffee is not at all analogous to this case. While USAir continues to claim that the flow of information will be curtailed in the future unless this Court finds these documents to be privileged, it has presented *no evidence* in support of this self-serving conclusion. USAir asks this Court to accept *on faith* that a privilege is mandatory to get USAir to conduct ongoing internal safety audits.[4] USAir's claim that it will not conduct safety audits if they are discoverable is not credible. Few courts have ever recognized the self-critical evaluation privilege. None have applied it to documents like those USAir seeks to protect. Thus, at the time USAir prepared the subject documents or had them prepared, it could not have relied on the existence of a privilege. Yet, the documents were prepared anyway, clear evidence that a privilege is *not needed* to encourage airlines to self inspect.

USAir conducts safety audits for good reasons having little or nothing to do with litigation issues. And USAir will continue to because it is in its best interests to do so, with or without a privilege. It is in USAir's best interests because a reputation for safety renders its service more marketable. *Cf. Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 426 (9th Cir. 1992). As Judge Anderson explained:

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[4] USAir's claim, if accurate, would demonstrate an irresponsibility for the safety of the flying public inconsistent with the privilege conferred upon USAir by the FAA to transport passengers for hire.

> It is beyond dispute that the airline industry is highly competitive and tightly regulated. Moreover, all airlines have a keen interest in advancing and promoting safety as well as improving service. Airlines are, therefore, likely to conduct internal audits from time to time to insure improved efficiency (both in terms of service and economy), safety, and marketability. While disclosure of these audits to competitors of USAir would certainly deter use of them in the future, disclosure for limited use in litigation (such as to prove notice) is unlikely to deter their use.

In Re Air Crash at Charlotte, North Carolina on July 2, 1994, MDL 1014, Order of Judge Joseph F. Anderson, Jr., Dated October 2, 1995, p. 6a (D.S.C. October 1995) (Appendix A to Petition for Writ of Prohibition).

In *Jaffee*, an interpretation of federal law was at issue. The instant case involves the interpretation of state law. In *Jaffee*, all fifty states and the District of Columbia recognized the psychotherapist privilege. In the instant case, almost no states recognize the self-critical evaluation privilege. The Judicial Conference Advisory Committee recommended adoption of the psychotherapist privilege, no similar recommendation was made regarding the self-critical evaluation privilege. In *Jaffee*, there was a split among the appellate courts over whether or not the psychotherapist privilege should be recognized under federal law. In contrast, the two courts of appeals to address the self-critical evaluation privilege refused to protect allegedly privileged documents. *In Re: USAir, Inc., Order Dated May 2, 1996* (4th Cir. 1996); *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 426 (9th Cir. 1992).

In summary, the courts below did not usurp authority or abuse their discretion in rejecting USAir's privilege claims. Testimonial privileges are in derogation of the search for truth and should, therefore, not be lightly created nor expansively construed. Advisory Circular 120-56 is inapplicable on its face. USAir has wisely abandoned its arguments that the courts below abused their discretion. Therefore, USAir has failed to prove by any evidence, let alone that which is "clear and indisputable," that it is entitled to a writ of prohibition.

3. USAIR HAS NOT ESTABLISHED BY CLEAR AND INDISPUTABLE EVIDENCE ITS RIGHTS WILL BE IRRETRIEVABLY LOST UNLESS THIS COURT ACTS.

There is no risk that any of USAir's rights will be irretrievably lost if this Court does not issue a writ of prohibition. The contested documents have been and still are covered by a protective order issued by the District Court.[5] Furthermore, after this Court denied USAir's

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[5] On November 14, 1995, Judge Anderson granted a protective order governing the possible uses of the six documents when produced. In particular, the court ruled:

> WHEREFORE, IT IS ORDERED that plaintiffs and their counsel shall be prohibited from disclosing, disseminating or communicating in any manner to any person or entity not involved in this litigation any portion of the information contained in those documents designated numbers 3, 4, 5, 20, 21, and 28 on defendant's list of privileged documents, which list was filed on September 20, 1995. Plaintiffs and their counsel shall be further precluded from utilizing

motion for a stay, the subject documents were produced on August 26, 1996. Therefore, subject to the protective order, Respondents are now in possession of the contested documents.

There is no indication that the protective order has been or will be violated by any of the parties to this litigation. There have been no rulings on the admissibility of the documents at trial. Such rulings are fully reviewable by proper post-trial procedures. USAir rights will not be irretrievably lost if this Court denies its Petition for Writ of Prohibition. Indeed, since the documents have now been produced, it is questionable whether a justiciable issue remains to be decided by this Court at all.

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these documents or the information contained in them for any purpose other than for this multidistrict litigation.

In furtherance of this order, plaintiffs' counsel shall insure that each person who is to be given access to the referenced documents, including plaintiffs and their attorneys, shall first sign a document acknowledging that they are aware of and will comply with this order. Plaintiffs' counsel shall maintain a list of these persons which shall be provided to Petitioner's attorneys upon request, subject to protection upon application to this court for good cause shown.

In Re Air Crash at Charlotte, North Carolina on July 2, 1994, MDL 1014, Order of Judge Joseph F. Anderson, Jr., Dated November 14, 1995 (D.S.C.) (Attached to Respondents' Brief as Appendix A).

CONCLUSION

Wherefore, Respondents request that this Court deny USAir's Petition for Writ of Prohibition.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

IN RE: AIR CRASH AT CHARLOTTE, NORTH CAROLINA ON JULY 2, 1994	MDL DOCKET NO. 1041 JUDGE JOSEPH F. ANDERSON, JR. ORDER ON USAIR'S MOTION FOR RECONSIDERATION (SELF CRITICAL EVALUATION PRIVILEGE) (Filed Nov. 14, 1995)

Defendant USAir, Inc. ("USAir") has moved for reconsideration of this court's Order denying USAir's motion for a protective order and granting plaintiffs' motion to compel discovery of specified documents as to which USAir claims a self-critical evaluation privilege. Order filed October 26, 1995. This court grants the motion for reconsideration to the extent it seeks to limit the possible uses of the documents to be produced. The motion for reconsideration is denied in all other respects.

WHEREFORE, IT IS ORDERED that plaintiffs and their counsel shall be prohibited from disclosing, disseminating or communicating in any manner to any person or entity not involved in this litigation any portion of the information contained in those documents designated numbers 3, 4, 5, 20, 21, and 28 on defendant's list of

privileged documents, which list was filed on September 20, 1995. Plaintiffs and their counsel shall be further precluded from utilizing these documents or the information contained in them for any purpose other than for this multidistrict litigation.

In furtherance of this order, plaintiffs' counsel shall insure that each person who is to be given access to the referenced documents, including plaintiffs and their attorneys, shall first sign a document acknowledging that they are aware of and will comply with this order. Plaintiffs' counsel shall maintain a list of these persons which shall be provided to USAir's attorneys upon request, subject to protection upon application to this court for good cause shown.

IT IS SO ORDERED.

/s/ Joseph F. Anderson, Jr.
Joseph F. Anderson, Jr.
United States District Judge

November 14, 1995
Columbia, South Carolina